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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Portals II
445 12th Street, S.W., TW-A325
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Response to IXC Refund *Ex Parte* of July 2, 2002; Implementation
of the Pay Telephone Reclassification and Compensation Provisions
of the Telecommunications Act of 1996, CC Docket No. 96-128

Dear Ms. Dortch:

On behalf of the American Public Communications Council ("APCC"), this letter responds to the IXC Refund *Ex Parte* of three interexchange carriers ("IXCs") – AT&T, WorldCom, and Sprint. See Letter to Marlene H. Dortch, Secretary, FCC, from Teresa Marrero, AT&T, Larry Fenster, Worldcom, Inc., and John E. Benedict and H. Richard Juhnke, Sprint Corp. (July 2, 2002) ("IXC Refund *Ex Parte*"). The IXC Refund *Ex Parte* addresses a possible true-up for the Interim Period (November 7, 1996 – October 6, 1997) and the Intermediate Period (October 7, 1997 – April 21, 1999) in the above-referenced proceeding. The IXC Refund *Ex Parte* urges the Commission to ignore the overwhelming record that independent payphone service providers ("PSPs") have developed demonstrating that not only is no true-up required, but it would violate controlling precedent to order a true-up.

Nothing in the IXC Refund *Ex Parte* refutes APCC's argument that, as a matter of equity, independent PSPs should not be required to pay refunds for the Intermediate Period. In fact, the IXCs' response is most noteworthy for what it does not say. The IXCs do not dispute the material facts. They offer no specific challenge or alternative data to refute APCC's estimates of independent PSPs' undercompensation in the Intermediate Period and the Early Period (June 1, 1992 – November 6, 1996). And the IXCs do not deny that they have already recovered from end users the full amount of the compensation payments for which they now seek refunds.¹

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¹ AT&T did deny, without any supporting evidence, in a separate *ex parte* letter dated August 23, 2002, that it recovered all costs of dial-around compensation from end users. APCC will respond to AT&T's August 23 letter in a separate *ex parte* letter that will be filed in the near future.

Moreover, the IXC's do not dispute the key premises underlying APCC's argument. They do not, because they cannot, claim that refunds were required by the court in its remand of the Commission's \$.284 rate order. *MCI Telecommunications Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998). Indeed, they acknowledge that no refund was required. And they do not, because they cannot, deny that the standard for a retroactive true-up is equity. Instead, the IXC's argue that the Commission's equitable analysis should be constrained by disallowing consideration of every equitable factor proposed by APCC – the gross undercompensation of PSPs during the Early Period, the actual undercompensation of PSPs by IXC's during the Intermediate Period, and every other factor except the bare fact that a lower rate was prospectively prescribed on remand.

The case law does not support such a blinkered conception of equity. Rather, the case law confirms that the Commission is required to look at the particular facts of the case to determine what is equitable. *Kotch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816-817 (D.C. Cir. 1998). As APCC has previously demonstrated, the Commission's planned true-up would leave independent PSPs severely undercompensated for both the Early Period (1992-96) and the Intermediate Period (1997-99). See Allocation of IXC Shares, *Ex Parte* Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer, Robert F. Aldrich and Robert N. Felgar at 9 (May 23, 2002) (demonstrating the extent of Early Period undercompensation); Retroactive Adjustment of Interim Compensation, *Ex Parte* Letter to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, from Albert H. Kramer and Robert F. Aldrich (March 26, 2002) (demonstrating the extent of Intermediate Period undercompensation). It is now all but certain that, as a result of the bankruptcies of WorldCom and Global Crossing, PSPs will be severely undercompensated *even for the Interim Period* (1996-97).² There is no room for dispute that a true-up scheme that leaves PSPs severely undercompensated for every compensation period from 1992 through 1999 is not equitable. Moreover, leaving independent PSPs out of a true-up would not be unfair to AT&T (the only IXC who would be owed money in the true-up under consideration for the Interim and Intermediate Periods)³ because AT&T has already recovered the cost of dial-around compensation from its end users, and because AT&T severely undercompensated independent PSPs in the Early Period.

I. THE IXC'S DO NOT SERIOUSLY CHALLENGE THE VALIDITY OF APCC'S ESTIMATES OF PSP'S UNDERCOMPENSATION

Most notable in the IXC's Refund *Ex Parte* is the absence of any substantive challenge to APCC's undercompensation claims for either the Early Period or the Intermediate Period. Almost as an afterthought, the IXC's Refund *Ex Parte* asserts that APCC's estimates as to the Early Period "are based on layer upon layer of factual

² APCC will be submitting a separate *ex parte* letter regarding the effects of the WorldCom and Global Crossing bankruptcies on a true-up for the Interim and Intermediate Periods.

³ See Allocation of IXC Shares, *Ex Parte* Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer, Robert F. Aldrich and Robert N. Felgar at 7 (May 23, 2002).

assumptions.” IXC Refund *Ex Parte* at 2. But the IXCs do not challenge the accuracy of those assumptions, demonstrate the manner in which the assumptions are flawed, or proffer a different calculation of Early Period underpayments that would change the overall result.⁴ The IXCs certainly do not deny, and cannot deny, that independent PSPs were significantly undercompensated in the Early Period. Common sense alone dictates that independent PSPs must have been massively undercompensated in the Early Period, since they were not compensated at all for subscriber 800 calls.

Moreover, APCC’s use of reasonable assumptions to fill in for missing data does not destroy the validity of APCC’s estimates. The Commission frequently relies on assumptions in a myriad of settings.⁵ The question is not whether APCC relied on assumptions but whether those assumptions are reasonable.⁶ In light of the IXCs’ failure to demonstrate that APCC’s methodology is unreasonable, or to supply alternative data based on reasonable assumptions that change the overall result, the Commission should accept APCC’s estimates.

II. *MCI v. FCC* DOES NOT REQUIRE A TRUE-UP

The IXCs begin by stating that APCC’s argument against refunds “misreads the *MCI Remand Decision*,” but go on to refute their own position, and to confirm APCC’s position that the court left it to the Commission’s discretion to decide whether the equities justify a refund. IXC Refund *Ex Parte* at 2. As quoted by the IXCs, the court said that “if and when on remand the Commission establishes a different rate for coinless payphone calls, the Commission *may order* payphone service providers to refund to their customers

⁴ The IXCs’ Refund *Ex Parte* offers no challenge whatever to APCC’s demonstration that independent PSPs were undercompensated for the Intermediate Period and would be pushed even further “under water” if required to provide refunds.

⁵ See e.g., *Amendment of the Commission’s Rules to Establish Part 72, the Wireless Communications Service*, Memorandum Opinion and Order, 12 FCC Rcd 3977, 3993, n.44 (1997) (“one of the primary difficulties in performing this evaluation is the number of unknowns due to changing designs of systems that are not yet deployed. Our analysis must, therefore, necessarily depend on what we believe to be reasonable assumptions”); *Federal-State Joint Board on Universal Service*, Tenth Report and Order, 84 FCC Rcd 20156, 20268 (1999) (“it is reasonable for the model to assume that a ‘jumper’ method will be used half the time and a ‘punch down’ method will be used the remainder of the time to cross-connect on SAI.”).

⁶ The IXCs list five assumptions in APCC’s calculation of IXC underpayments which they assert are mere “speculation.” IXC Refund *Ex Parte* at 10. APCC, however, carefully explained its assumptions and why they are reasonable in its submissions to the Commission. See Early Period Compensation, *Ex Parte* Letter to William F. Caton, Acting Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich (April 15, 2002). In fact, APCC has demonstrated that its assumptions are *very conservative*. *Id.* The IXCs, for their part, have not even attempted to show that the assumptions are unreasonable or overly generous to independent PSPs.

any excess charges for coinless calls collected pursuant to the current rates.” *MCI Remand Decision* at 608 (emphasis added), quoted in IXC Refund *Ex Parte* at 3. As again quoted by the IXCs, the court relied on the Commission’s statement that “it has the authority to adjust the compensation rate retroactively ‘should the equities so dictate.’” *Id.* These quotations make it crystal clear that the court neither required nor “expected” the Commission to grant a refund. Rather, it left that decision to the Commission’s discretion as the case law requires. See Standards for Granting Retroactive True-Ups, *Ex Parte* Letter to William F. Caton, Acting Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich at 3-4 (April 15, 2002) (“Standards *Ex Parte*”).

In fact, the IXCs concede that *MCI* does not require the Commission to order refunds. The most they venture to claim is that “The *MCI Remand Decision* fully supports the Commission’s retroactive adjustments” (IXC Refund *Ex Parte* at 2) – a far cry from asserting that the *MCI Remand Decision* requires refunds.

In fact, the *MCI Remand Decision* does not “fully support” the Commission’s decision to order refunds, and the Commission did not “properly implement the *MCI Remand Decision*” when it ordered refunds. IXC Refund *Ex Parte* at 2. The court clearly stated it was relying on the Commission to determine whether the “equities . . . dictate” ordering refunds. The Commission’s *Third Report and Order* reflects no consideration whatever of the equities of ordering refunds. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, 14 FCC Rcd 2545, ¶196 (1999).

III. THE IXCs’ CONTENTION THAT THE EARLY PERIOD SHOULD NOT BE CONSIDERED BECAUSE SECTION 276 DOES NOT APPLY TO THAT PERIOD MISSES THE POINT

The IXCs argue that in determining whether PSPs should pay refunds for the Intermediate Period, the Commission should disregard IXCs’ undercompensation of PSPs by an estimated \$82 million (\$135 million with interest) during the Early Period (June 1, 1992 to November 6, 1996) as a result of the Commission’s error. The IXCs contend that the Early Period must be treated as irrelevant because (1) PSPs had no statutory entitlement to compensation during the Early Period; (2) a different provision of the Communications Act governed dial-around compensation during the Early Period; and (3) the Commission previously declined to award retroactive compensation for the Early Period. IXC Refund *Ex Parte* at 4-5, 7-9.

With respect to the first point, the IXCs’ arguments lack merit because under the applicable standard for a true-up, which is equity, the Commission is required to make an *equitable*, not *legal* determination, as to whether a true-up is appropriate. APCC has demonstrated that, from an equitable perspective, due to the IXCs’ undercompensation of independent PSPs during both the Early and Intermediate Periods, the IXCs have no legitimate equitable claim that they require refunds to be made whole by independent PSPs or to prevent unjust enrichment of independent PSPs. On the contrary, independent PSPs did not recover, during the Interim and Intermediate Periods, all of the compensation to which they were entitled as a matter of law. See Independent PSP Compensation (1992-

1999) (graph), Attachment to Notice of *Ex Parte* Communication to Marlene H. Dortch, Secretary, FCC, from Robert N. Felgar (August 28, 2002).

In support of their claim that undercompensation cannot be said to exist during the Early Period, the IXC's point out that the statute in effect during the Early Period authorized, but did not require, the Commission to prescribe dial-around compensation. While that is true, it is just as true that for the Intermediate Period the Commission is authorized, but not required, to order a retroactive refund. The question to be addressed regarding both periods is whether equity dictates an adjustment of compensation. With respect to the Early Period, the Commission erroneously decided that the statute then in effect did not authorize it to prescribe compensation for subscriber 800 calls. As a result of this error, the Commission did not consider PSPs' need for compensation for such calls. *Florida Pub. Telecomm. Ass'n, Inc. v. FCC*, 54 F.3d 857 (D.C. Cir 1995). It is equitable for the Commission to consider its earlier error that precluded compensation for the Early Period in deciding whether to order a refund for the Intermediate Period.

The IXC's second argument, that the Early Period is irrelevant because a different provision of the Communications Act governed dial-around compensation during the Early Period, is simply wrong. Consideration of Early Period undercompensation is fully consistent with Section 276. Nothing in Section 276 suggests that the Commission's failure to order compensation for subscriber 800 calls was "right." On the contrary, Section 276's requirement that independent PSPs be compensated "fairly" is a vindication of the equity of considering the Early Period.

Section 276 of the Act makes clear that PSPs deserve fair compensation for every dial-around call, including subscriber 800 calls. 47 U.S.C. § 276(b)(1)(A). This federal policy must guide the Commission's equitable analysis. While the *law* may have changed in 1996, the IXC's offer no explanation of why the Commission's determination of what is *fair and equitable* can be different for compensation paid before and after November 7, 1996. If *fairness* required compensation of independent PSPs for each and every dial-around call placed on November 8, 1996, then it could not possibly have been *fair* to leave independent PSPs' uncompensated for most of the dial-around calls placed before November 6, 1996.

The IXC's third argument is that the Commission, in an earlier order, concluded that no additional Early Period compensation was warranted, so that any different conclusion today would constitute "retroactive ratemaking." However, the Commission reached no such conclusion. In the order cited by the IXC's, the Commission made no determination as to whether additional compensation for the Early Period was warranted. The Commission simply stated, without explanation, that it would apply the new compensation scheme only in a prospective manner. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, ¶126 (1996). Moreover, while the IXC's argument might be relevant if APCC was actually requesting to be paid retroactively for Early Period calls, APCC is not making any such request. APCC's only contention is that since the relevant standard is equity, the Commission must consider the fact that PSPs were *not* fairly compensated during the Early Period as a result of the Commission's error of statutory

interpretation. If the Commission is now legally barred from making independent PSPs whole for all three periods, then the Commission should still refrain from aggravating that unfair result by ordering refunds that will make independent PSPs even less whole.

Indeed, the fact that the Commission did not order a true-up for the Early Period strengthens APCC's argument that the Commission should not order a true-up for the Intermediate Period. For the Early Period, the Commission was faced with a court remand of its erroneous compensation decision and elected not to correct its error retroactively. For the Intermediate Period, the Commission is similarly faced with a court remand of its prior compensation decision. For the Commission to order a refund for the Intermediate Period would be not only inequitable, but also inconsistent with its earlier decision *not* to order a true-up for the Early Period.⁷ It is inconsistent for the Commission to order refunds, to the detriment of independent PSPs, for the Intermediate Period, after denying independent PSPs the benefit of a true-up for the Early Period. Moreover, such inconsistent decisions would compound the inequity to independent PSPs by ensuring that independent PSPs are undercompensated for both periods.

IV. CONTRARY TO THE IXC's ASSERTIONS, THE CASE LAW DOES NOT SUPPORT A TRUE-UP

The IXCs cite three cases that allegedly support their position that a true-up is appropriate when "a refund covers the period during which litigation over the rates occurred, so that the parties had full notice of the possible rate changes" and "the need for the refund is a result of agency error which the courts correct on appeal."⁸ IXC Refund *Ex Parte* at 5-6. The IXCs, however, miss a key assumption made by these cases. That is, a true-up is appropriate only if it makes the parties whole. *Exxon Co. v. FERC*, 182 F.3d 30 (D.C. Cir. 1990) ("[t]here is a strong equitable presumption in favor of retroactivity that would make the parties whole.") And even if a true-up does make the parties whole, an agency is not required to order a true-up if other equitable factors counsel against a true-up. *Id.*

Moreover, if full notice of a possible rate change, and an agency error corrected on appeal make a true-up particularly appropriate for the Intermediate Period, then the same circumstances made retroactive compensation particularly appropriate for the Early Period. During the Early Period, the Commission's dial-around compensation scheme was continuously under court challenge and the court in *Florida Pub. Telecomm. Ass'n v. FCC*, 54 F.3d 857, determined that the Commission's reasons for compensating PSPs for

⁷ The Interim Period may present somewhat different considerations. In the Interim Period – unlike the Early and Intermediate Periods – the compensation rate was *vacated* by the court of appeals. Thus, there was no compensation rate in effect for much of that period. This difference could justify retroactive application of a rate to the Interim Period even though no retroactive true-up is applied to the Early and Intermediate Periods.

⁸ The three cases cited by the IXCs include *Exxon Co. v. FERC*, 182 F.3d 30 (D.C. Cir. 1999); *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001); *Public Serv. Co. of Colo. v. FERC*, 91 F.3d 1478 (D.C. Cir. 1996).

access code calls, but not subscriber 800 calls, were unreasonable. Thus, under the IXCs' own interpretation of the case law, the Commission should consider the Early Period in its analysis of whether and how to order a true-up.

In addition, the IXCs' assertion that the cases cited by APCC in its submissions are inapplicable is both irrelevant and incorrect. The IXCs' assertion is irrelevant because, as discussed above, even the cases cited by the IXCs support APCC's position that the Commission has discretion regarding whether to order a true-up and that the Commission should be guided by equitable factors in exercising that discretion.

The IXCs' assertion is incorrect because *Moss v. Civil Aeronautics Bd.*, 521 F.2d 298 (D.C. Cir. 1975), cited by APCC in its Standards Ex Parte of April 15, 2002, states that even in cases where a reviewing court finds that the rates originally set by the agency are unjust and unreasonable, the legal standard for ordering a retroactive refund is equity. The court in *Moss v. Civil Aeronautics Bd.* held that in deciding whether to order a refund, an agency must ultimately decide whether such a refund is equitable. The court explained that

There are distinct equitable considerations which may prevent a [refund] *even where fares had been found to exceed what was just and reasonable*. . . . Even if excessive profits were made in a given period, there may be inequity in trying to recover them, particularly if large classes of people are involved.

Moss v. Civil Aeronautics Bd., 521 F.2d at 308 (emphasis added). In the instant case, there were no excessive profits by PSPs. Indeed, PSPs did not even recover the costs to which the Commission has determined they were entitled. Thus, the court left no doubt that even when an agency determines that a rate is unjust and unreasonable, the appropriate standard for determining whether to order a refund is equity.

A true-up for the Intermediate Period involving independent PSPs would leave independent PSPs undercompensated and IXCs overcompensated. *See* Early Period Compensation, *Ex Parte* Letter to William F. Caton, Acting Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich (April 15, 2002); Retroactive Adjustment of Interim Compensation, *Ex Parte* Letter to Dorothy Attwood, Chief Common Carrier Bureau, FCC, from Albert H. Kramer and Robert F. Aldrich (March 26, 2001). IXCs have already recovered the costs of dial-around compensation from end users. *See* Standards for Granting Retroactive True-Ups, *Ex Parte* Letter to William F. Caton, Acting Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich at 9-12 (April 15, 2002). Moreover, other equitable factors, such as the administrative nightmare of involving independent PSPs in a true-up, counsel against involving independent PSPs in a true-up. *See id.* at 13.

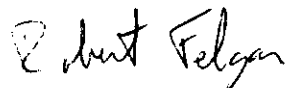
None of the cases cited by the IXCs justifies the Commission in refusing to consider the equities in deciding whether to order a true-up. In fact, the opposite is true. The cases cited by the IXCs affirm the principle that the Commission should exercise its discretion in light of the equities. For example, the court in *Verizon Telephone Comp., et al. v. FCC*, 269 F.3d 1098, 1111 (D.C. Cir. 2001), stated that "[w]e have previously held

that administrative agencies *have greater discretion* to impose their rulings retroactively when they do so in response to judicial review, that is when the purpose of retroactive application is to rectify legal mistakes identified by a federal court." (emphasis added). Similarly, the court in *Exxon Co. v. FERC*, stated that "[r]efunds are not mandatory; the Commission has the discretion to decide whether a refund is warranted in light of the interests of the customer and the utility." *Exxon Co. v. FERC*, 182 F.3d at 49 (*quoting Second Taxing Dist. Of the City of Norwalk v. FERC*, 684 F.2d 477, 490 (D.C. Cir. 1982)). *See also Exxon Co.*, 182 F.3d at 30. The Commission, therefore, has ample authority to do what equity requires.

V. CONCLUSION

If anything, the IXC's attack has bolstered APCC's position that the Early Period must be considered in any true-up. First, the IXCs fail to seriously challenge APCC's estimates of undercompensation by IXCs of independent PSPs in the Early Period. Second, the IXCs fail to rebut APCC's position that the relevant legal standard for ordering a true-up is equity. Under such an equitable standard, the massive undercompensation of independent PSPs during the Early Period is clearly relevant to determining whether refunds will make independent PSPs whole. In light of the massive undercompensation of independent PSPs in the Early Period and other equitable factors raised by APCC in its *ex parte* submissions, the Commission should not order a true-up for the Intermediate Period.

Sincerely yours,



Albert H. Kramer
Robert F. Aldrich
Robert N. Felgar

AHK/mjo

cc: Jeff Carlisle
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